

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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TOMMY KIM BAE,

**Plaintiff.**

V.

STEPHEN WYNN; WYNN RESORTS  
LIMITED,

### Defendants.

Case No. 2:14-cv-00150-RFB-NJK

## ORDER

## I. INTRODUCTION

15 This case is before the Court on a Motion to Dismiss or, in the alternative, Motion for More  
16 Definite Statement filed by Defendants Stephen Wynn and Wynn Resorts, Limited. ECF No. 7.  
17 Plaintiff Tommy Kim Bae filed a Complaint against Defendants on January 28, 2014, alleging  
18 violations of the Foreign Intelligence Surveillance Act (FISA) and the Racketeer Influenced and  
19 Corrupt Organizations Act (RICO). ECF No. 1. Because Bae has stated no plausible claim upon  
20 which relief can be granted, the Court grants the Motion to Dismiss and gives Bae leave to amend  
21 his Complaint. The Court also denies the remaining motions currently pending in this case for the  
22 reasons stated below.

23 | II. BACKGROUND

24 The following background is taken from Bae's Complaint. ECF No. 1. Bae states that he  
25 was employed by Defendants and that he orally complained to them of acts between December  
26 2012 and June 2013 that he believed violated his privacy. Id. ¶ 1. Following this complaint, Bae  
27 resigned from his job. Id. After the allegedly invasive acts continued to worsen, Bae sent a written  
28 complaint to Defendants via email on August 27, 2013, which he intended to be received by the

1 Board of Directors for Defendant Wynn Resorts. Id. ¶ 2. Bae received no reply and the alleged  
 2 invasion of his privacy continued. Id. Bae then submitted a report to officer #4408 of “Las Vegas’  
 3 FBI Agency” on January 15, 2014, naming specific individuals whom he suspected of violating  
 4 his privacy. Id. ¶ 3. The next day, Bae received a “Notice of Trespass” from Defendants, although  
 5 Bae does not provide the contents of this notice or attach it to his Complaint. Id. ¶ 4.

6 Bae alleges that “the fact that [his] privacy at home felt compromised,” combined with the  
 7 fact that he received a trespass notice immediately after contacting law enforcement regarding  
 8 Defendants’ allegedly invasive acts, constitute evidence of illegal electronic surveillance. Id. ¶ 5.  
 9 Bae states that he assumes he was given the notice because Defendants deemed him to be a danger  
 10 to their assets, and also alleges that Defendants continue to electronically surveil him. Id.

11 Bae’s Complaint appears to state two claims for relief: (1) violation of the electronic  
 12 surveillance provisions of FISA, for which he seeks actual damages, punitive damages, and fees  
 13 under 50 U.S.C. § 1810; and (2) violation of the RICO statute (18 U.S.C. § 1962) through acts of  
 14 invasion of privacy, sexual harassment, credit fraud, stalking, and terrorism or war crimes. Id. at  
 15 1-2.

16 Defendants move to dismiss, arguing that Bae has improperly claimed that diversity  
 17 jurisdiction exists in this case and that he has failed to set forth any facts to support a FISA or  
 18 RICO claim. ECF No. 7 at 3. Defendants also contend that dismissal should be with prejudice  
 19 because, if allowed to amend his Complaint, Bae would not be able to set forth any plausible facts  
 20 to support the claims. Id. In the alternative, Defendants request that the Court order Bae to provide  
 21 a more definite statement of his pleading under Rule 12(e) on the grounds that the claims are so  
 22 vague that they deny Defendants a meaningful opportunity to respond. Id. at 9-10.

### 23 III. LEGAL STANDARD

#### 24 A. Motion to Dismiss

25 An initial pleading must contain “a short and plain statement of the claim showing that the  
 26 pleader is entitled to relief.” Fed. R. Civ. P. 8(a). The court may dismiss a complaint for failing to  
 27 state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a motion to  
 28 dismiss, “[a]ll well-pleaded allegations of material fact in the complaint are accepted as true and

1 are construed in the light most favorable to the non-moving party.” Faulkner v. ADT Sec. Servs.,  
 2 Inc., 706 F.3d 1017, 1019 (9th Cir. 2013) (citations omitted). Additionally, the Court must liberally  
 3 construe the filings of a plaintiff who is proceeding *pro se*, as is the case here. Butler v. Long, 752  
 4 F.3d 1177, 1180 (9th Cir. 2014).

5 To survive a motion to dismiss, a complaint need not contain “detailed factual allegations,”  
 6 but merely asserting “‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause  
 7 of action’” is not sufficient. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic  
 8 Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, a claim will not be dismissed if it  
 9 contains “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its  
 10 face,” meaning that the court can reasonably infer “that the defendant is liable for the misconduct  
 11 alleged.” Iqbal, 556 U.S. at 678 (citation and internal quotation marks omitted). In sum, at the  
 12 motion to dismiss stage, “[t]he issue is not whether a plaintiff will ultimately prevail but whether  
 13 [he] is entitled to *offer* evidence to support the claims.” Cervantes v. City of San Diego, 5 F.3d  
 14 1273, 1274-75 (9<sup>th</sup> Cir. 1993) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)) (emphasis  
 15 in original).

16 “As a general rule, a district court may not consider any material beyond the pleadings in  
 17 ruling on a Rule 12(b)(6) motion.” Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)  
 18 (citation and internal quotation marks omitted). If the district court relies on materials outside the  
 19 pleadings submitted by either party to the motion to dismiss, the motion must be treated as a Rule  
 20 56 motion for summary judgment. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996). Two  
 21 exceptions to this rule exist. First, the court may consider extrinsic material “properly submitted  
 22 as part of the complaint,” meaning documents either attached to the complaint or upon which the  
 23 plaintiff’s complaint necessarily relies and for which authenticity is not in question. Lee, 250 F.3d  
 24 at 688 (citation omitted). Second, the court “may take judicial notice of matters of public record.”  
 25 Id. (citation and internal quotation marks omitted).

#### 26 IV. DISCUSSION

##### 27 A. The Court Has Subject Matter Jurisdiction Over This Case

28 First, Defendants argue that this case should be dismissed for lack of jurisdiction. In the

1 Civil Cover Sheet attached to his Complaint, Bae indicated that diversity of citizenship, rather than  
 2 federal question, is the basis of jurisdiction in this case. ECF No. 1.

3 District courts have diversity jurisdiction “where the matter in controversy exceeds the sum  
 4 or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different states.”  
 5 28 U.S.C. § 1332(a)(1). Diversity jurisdiction exists “only if diversity of citizenship among the  
 6 parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same  
 7 State.” Wisconsin Dept. of Corr. v. Schacht, 524 U.S. 381, 388 (1998). Here, Bae indicates on his  
 8 cover sheet that he is a citizen of Nevada. ECF No. 1. He also states that Defendants are citizens  
 9 of Nevada, other states, and a foreign country. *Id.* Therefore, on its face, Bae’s Complaint cannot  
 10 proceed on the basis of diversity jurisdiction.

11 However, district courts have an independent obligation, regardless of the parties’  
 12 arguments, to address whether subject matter jurisdiction exists. United Investors Life Ins. Co. v.  
 13 Waddell & Reed Inc., 360 F.3d 960, 966 (9th Cir. 2004). The Court finds that while it does not  
 14 appear to have jurisdiction on the basis of diversity of citizenship, federal question jurisdiction  
 15 clearly exists in this case. Under 28 U.S.C. § 1331, district courts have original jurisdiction “of all  
 16 civil actions arising under the Constitution, laws, or treaties of the United States.” Bae alleges that  
 17 Defendants invaded his privacy and brings claims under the FISA and RICO statutes, both of  
 18 which are “laws . . . of the United States.” *Id.* The Court thus possesses subject matter jurisdiction  
 19 over this action and will consider the merits of Defendants’ motion.

20 **B. Bae Has Failed to State a Claim for Unlawful Electronic Surveillance**

21 Section 1810 of FISA provides a right of action to any “aggrieved person, other than a  
 22 foreign power or an agent of a foreign power” who has been subjected to electronic surveillance  
 23 as defined in the statute, or who has had information about them obtained by electronic surveillance  
 24 and unlawfully used or disclosed. 50 U.S.C. § 1810. The statute defines an “aggrieved person” as  
 25 “a person who is the target of an electronic surveillance or any other person whose communications  
 26 or activities were subject to electronic surveillance.” 50 U.S.C. § 1801(k). Generally, “electronic  
 27 surveillance” is defined as the acquisition of wire or radio communications, or the installation of  
 28 a surveillance device to monitor and acquire information, under circumstances in which a person

1 would have a reasonable expectation of privacy.<sup>1</sup> 50 U.S.C. § 1801(f).

2       The Court finds that Bae has not stated a claim for unlawful electronic surveillance under  
 3 Section 1810 of FISA. In his Complaint, Bae does not state that he was subjected to electronic  
 4 surveillance. Bae does not allege that Defendants acquired any of his radio or wire communications  
 5 or that Defendants installed any device to monitor and acquire his information. In support of his  
 6 FISA claim, Bae merely states the following: (1) his privacy at home felt compromised; (2) he  
 7 received a Notice of Trespass one day after filing a report with law enforcement; and (3) that he  
 8 “still show[s]/experience[s] signs of being under ‘electronic surveillance.’” Compl. ¶ 5. However,  
 9 these allegations, even when accepted as true and liberally construed in Bae’s favor in light of his  
 10 *pro se* status, are not sufficient to allow the Court to reasonably infer that Defendants have  
 11 committed unlawful electronic surveillance. Bae’s allegations that his privacy felt compromised  
 12 and that he is experiencing signs of being under electronic surveillance are not specific enough to  
 13 lead to an inference that Defendants are liable. Moreover, Bae’s claim that he received a trespass  
 14 notice immediately after contacting law enforcement, even combined with the other statements,  
 15 does not suffice to “raise a right to relief above the speculative level.” Williams v. Gerber Products  
 16 Co., 552 F.3d 934, 938 (9th Cir. 2008) (quoting Twombly, 550 U.S. at 545).

17       Therefore, Bae has failed to state a claim for unlawful electronic surveillance upon which  
 18 relief can be granted, and this claim is dismissed. However, Bae shall be given leave to amend this  
 19 claim, as will be discussed below.

### 20           C.     Bae Has Failed to State a RICO Claim

21       Section 1964 of the federal RICO Act provides a private right of action to “[a]ny person  
 22 injured in his business or property by reason of a violation of section 1962” of the Act. 18 U.S.C.  
 23 § 1964(c). Section 1962 prohibits “pattern[s] of racketeering activity” conducted by, or for the  
 24 benefit of, an “enterprise,” as well as any conspiracy to do so. 18 U.S.C. § 1962. In order to  
 25 establish a civil RICO claim, a plaintiff must allege the following: “(1) conduct (2) of an enterprise  
 26 (3) through a pattern (4) of racketeering activity (known as ‘predicate acts’) (5) causing injury to

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27           <sup>1</sup> Four specific types of acquisitions that constitute electronic surveillance are  
 28 specifically defined in Section 1801(f).

1 plaintiff's business or property." United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr.  
 2 Trades Dept., AFL-CIO, 770 F.3d 834, 837 (9th Cir. 2014) (internal quotation marks omitted).

3 The Court finds that Bae has not stated a civil RICO claim. Specifically, Bae has not pled  
 4 that Defendants constitute an "enterprise" within the meaning of the RICO Act, nor has he  
 5 plausibly alleged that Defendants engaged in a pattern of racketeering activity.

6 First, "[t]o show the existence of an enterprise under the second element [of a RICO claim],  
 7 plaintiff[ ] must plead that the enterprise has (A) a common purpose, (B) a structure or  
 8 organization, and (C) longevity necessary to accomplish the purpose." Eclectic Props. East, LLC  
 9 v. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014). Here, Bae's Complaint does not  
 10 contain any factual allegations that show the existence of an enterprise. The Complaint states that  
 11 Bae's privacy was invaded and accuses "Stephen Wynn as CEO of Wynn Resort Limited" under  
 12 the RICO Act. Compl. at 1-2. However, Bae provides no facts regarding the purpose, structure or  
 13 organization, or longevity of any enterprise.

14 Second, a "pattern of racketeering activity" is defined as at least two acts of racketeering  
 15 activity. 18 U.S.C. § 1961(5). "Racketeering activity" is defined as any act indictable under one of  
 16 the criminal offenses listed in the Act. 18 U.S.C. § 1961(1). The Complaint alleges predicate acts  
 17 of invasion of privacy, sexual harassment, credit fraud, stalking, and terrorism or war crimes.  
 18 However, Bae has not stated any factual allegations that would support a finding that an enterprise  
 19 (if one had been established) committed sexual harassment, credit fraud, stalking, terrorism, or  
 20 war crimes. At most, Bae has attempted to establish a predicate act of invasion of privacy, but even  
 21 if he had successfully done so, that tort is not a predicate act under RICO. See 18 U.S.C. § 1961(1).

22 Because he has not adequately pled the existence of an enterprise or any predicate acts that  
 23 would establish a pattern of racketeering activity, the Court will dismiss Bae's RICO claim under  
 24 Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendants' Motion to Dismiss is therefore  
 25 granted and its accompanying Motion for More Definite Statement is denied as moot. However,  
 26 Bae will be given leave to amend this claim.

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1           **V. LEAVE TO AMEND IS GRANTED AND BAE'S REMAINING MOTIONS  
2 RELATED TO HIS COMPLAINT ARE DENIED WITHOUT PREJUDICE**

3           Although Bae's Complaint fails to state a claim upon which relief can be granted, “[a] 4 district court should not dismiss a pro se complaint without leave to amend unless it is absolutely 5 clear that the deficiencies of the complaint could not be cured by amendment.” Akhtar v. Mesa, 6 698 F.3d 1202, 1212 (9th Cir. 2012). In his Complaint and in his response to the Motion to Dismiss, 7 Bae states that he sent an email to Defendants and a report to an “FBI agency” with more specific 8 allegations. In deciding this motion, the Court did not consider any material beyond the pleadings. 9 Therefore, since it appears that there may be more factual allegations that Bae could plead to survive dismissal, the Court will grant leave to amend.

10           The Court’s dismissal of Bae’s Complaint without prejudice also renders his remaining 11 motions moot. These include three Motions to Trial (ECF Nos. 10, 12, and 20), a Motion for 12 Hearing related to one of the Motions to Trial (ECF No. 21), a Motion for Summary Judgment or 13 Partial Summary Judgment or, alternatively, Motion for a More Definite Statement (ECF No. 22), 14 a second Motion for Hearing and Request for Judicial Notice related to his Motion for Summary 15 Judgment (ECF No. 37), and a second Motion for Summary Judgment (ECF No. 40). These 16 motions are therefore denied as moot.

17           **VI. THE PARTIES’ MOTIONS FOR SANCTIONS ARE DENIED**

18           The parties have also each filed motions requesting sanctions in this case. Defendants filed 19 a combined Motion to Strike and Motion for Sanctions against Bae on April 11, 2014. ECF Nos. 20 26, 27. On April 14, 2014, Bae filed a Motion to Sanction Defendants, including a request for the 21 imposition of criminal sanctions. ECF No. 30.

22           Rule 12(f) of the Federal Rules of Civil Procedure provides that the Court “may strike from 23 a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous 24 matter.” The purpose of a motion to strike under Rule 12(f) “is to avoid the expenditure of time 25 and money that must arise from litigating spurious issues by dispensing with those issues prior to 26 trial[.]” Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993) (internal quotation marks 27 omitted), rev’d on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).

28           Courts also have the inherent power to impose sanctions, including attorneys’ fees, “when

1 a party has acted in bad faith, vexatorily, wantonly, or for oppressive reasons.” Chambers v.  
 2 NASCO, Inc., 501 U.S. 32, 45-46 (1991) (internal quotation marks omitted). This inherent power  
 3 must be used with restraint, however. Id. at 44. Moreover, “[b]efore imposing sanctions under its  
 4 inherent sanctioning authority, a court must make an explicit finding of bad faith or willful  
 5 misconduct.” In re Dyer, 322 F.3d 1178, 1196 (9th Cir. 2003). Such a finding requires more than  
 6 mere negligence or recklessness. Id.

7         The Court denies Defendants’ Motion to Strike. While it appears that Bae may have filed  
 8 repetitive and unnecessary motions in this case, the Court exercises its discretion to deny these  
 9 motions as moot in light of its dismissal of the Complaint without prejudice. The Court also denies  
 10 Defendants’ Motion for Sanctions. The Court does not have sufficient information before it to  
 11 make a finding of bad faith or willful misconduct, particularly given Bae’s *pro se* status and the  
 12 fact that these filings occurred before any orders were issued from the Court in this case.

13         The Court also denies Bae’s Motion for Sanctions. In his motion, Bae alleges that  
 14 Defendants committed perjury by making a false declaration regarding his termination in their  
 15 Motion to Dismiss. ECF No. 30 at 1. Bae also requests criminal sanctions against Defendants for  
 16 engaging in electronic surveillance in violation of 50 U.S.C. § 1809 and for perjury and  
 17 subornation of perjury in violation of 18 U.S.C. § 1621 and § 1622. Id. at 1-2. Bae’s motion does  
 18 not provide any factual allegations that would support a finding of bad faith or willful misconduct  
 19 necessary for the imposition of sanctions under the Court’s inherent power. The Court especially  
 20 declines to issue criminal sanctions, as Bae has not yet even stated a claim for a RICO violation or  
 21 established that he, as a private citizen, is authorized to enforce the perjury statutes. See Cort v.  
 22 Ash, 422 U.S. 66, 79-80 (1975) (no private right of action to enforce “a bare criminal statute, with  
 23 absolutely no indication that civil enforcement of any kind was available to anyone.”).

24         Although the Court denies the motions for sanctions, Bae is hereby warned that if he files  
 25 an Amended Complaint in this case, he should refrain from the excessive and unnecessary filing  
 26 of motions. Failure to do so could result in the imposition of sanctions, up to and including the  
 27 dismissal of this case.

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1                   **VII. BAE'S MOTION FOR WRIT OF MANDAMUS IS DENIED**

2                   Finally, Bae filed a Motion for Relief and Writ of Mandamus with this Court on January  
 3                   8, 2015. ECF No. 46. Bae's motion is made under the Crime Victims' Rights Act (CVRA), which  
 4                   states that a crime victim may file a motion seeking relief with the district court for the district "in  
 5                   which a defendant is being prosecuted for the crime or, if no prosecution is underway . . . in which  
 6                   the crime occurred." 18 U.S.C. § 3771(d)(3). In this motion, the crime victim may assert any of  
 7                   the rights listed in subsection (a), including the right to protection from the accused and the right  
 8                   to confer with the Government's attorney in the case. 18 U.S.C. § 3771(a). If the district court  
 9                   denies the crime victim's motion for relief, the victim may file a petition for writ of mandamus in  
 10                  the court of appeals. 18 U.S.C. § 3771(d)(3).

11                  The Court denies Bae's Motion for Relief because Bae has not established that he is a  
 12                  "crime victim" within the meaning of the CVRA. In relevant part, the statute defines "crime  
 13                  victim" as "a person directly and proximately harmed as a result of the commission of a Federal  
 14                  offense[.]" 18 U.S.C. § 3771(e). Here, Bae has provided no evidence that Defendants have  
 15                  committed a federal offense and has failed to state a claim against Defendants for the federal causes  
 16                  of action in his Complaint. To the Court's knowledge, there is no criminal proceeding that is  
 17                  currently pending or that has been completed against Defendants in relation to Bae's allegations.  
 18                  Bae's allegations of wrongdoing by Defendants, interspersed throughout multiple briefs and made  
 19                  in a civil case brought under a Complaint that the Court is dismissing in this Order, are insufficient  
 20                  to establish that Defendants have committed a federal offense or that Bae has been directly and  
 21                  proximately harmed as a result. Therefore, the Court denies the requested relief in Bae's motion.  
 22                  Additionally, to the extent that Bae's motion was intended as a Petition for Writ of Mandamus,  
 23                  this Court lacks jurisdiction to consider it and dismisses it on that basis. See 18 U.S.C. § 3771(d)(3)  
 24                  ("If the district court denies the relief sought, the movant *may petition the court of appeals* for a  
 25                  writ of mandamus.") (emphasis added).

26                   **VIII. CONCLUSION**

27                  For the reasons stated above,

28                  **IT IS HEREBY ORDERED** that Defendants Stephen Wynn and Wynn Resorts Limited's

1 Motion to Dismiss (ECF No. 7) is GRANTED. Plaintiff Tommy Kim Bae's Complaint is  
2 DISMISSED with leave to amend.

3 **IT IS FURTHER ORDERED** that Defendants' Motion for More Definite Statement  
4 (ECF No. 8) is DENIED AS MOOT.

5 **IT IS FURTHER ORDERED** that Plaintiff Tommy Kim Bae's Motions to Trial (ECF  
6 Nos. 10, 12, and 20) are DENIED AS MOOT.

7 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Hearing (ECF No. 21) is  
8 DENIED AS MOOT.

9 **IT IS FURTHER ORDERED** that Plaintiff's Motions for Summary Judgment (ECF Nos.  
10 22 and 40) are DENIED AS MOOT.

11 **IT IS FURTHER ORDERED** that Defendants' Motion to Strike and for Sanctions  
12 Against Plaintiff (ECF Nos. 26 and 27) are DENIED.

13 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Sanction and Compel the  
14 Defendant and/or Motion to Apply Criminal Sanctions (ECF No. 30) is DENIED.

15 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Hearing and Request for Judicial  
16 Notice (ECF No. 37) is DENIED AS MOOT.

17 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Relief and Writ of Mandamus  
18 (ECF No. 46) is DENIED.

19 **IT IS FURTHER ORDERED** that Plaintiff shall have **30 days** from the date of this Order  
20 to file an Amended Complaint that addresses the deficiencies in his claims identified in this Order.  
21 If he does not do so within the time provided, this case will be dismissed with prejudice.

22 **IT IS FURTHER ORDERED** that Plaintiff is warned, if he files an Amended Complaint  
23 in this case, to refrain from the unnecessary and repeated filing of similar motions. Failure to  
24 comply with this warning may result in the imposition of sanctions, up to and including dismissal  
25 of this case.

26 DATED this 31st day of March, 2015.

  
27 RICHARD F. BOULWARE, II  
28 United States District Judge